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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 465

J. S. WOODS,

Petitioner,

vs.

INTERSTATE REALTY COMPANY,

Respondent

BRIEF AND ARGUMENT FOR PETITIONER

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I

Opinions Below

The opinion of the District Judge is not officially reported but is printed in the record at page 70, copy of which is made Appendix 1 to this brief.

The opinion of the Court of Appeals filed June 8, 1948, is reported in *Interstate Realty Company* v. *Woods*, 168 Fed. (2d) 701, and is printed in the record at page —, copy of which is made Appendix 2 to this brief.

The opinion of the Court of Appeals dated October 22, 1948, is reported in 170 Fed. (2d) 74, and copy is made Appendix 3 to this brief.

The opinion of the Court of Appeals dated November 26, 1948, is in the record at page — and is reported in 170 Fed. (2d), page 695, a copy of which is made Appendix 4 to this brief.

II

Jurisdictional Statement

The jurisdiction of this Honorable Court is invoked under New Title 28, United States Code, Judiciary and Judicial Procedure, Sections 1254, 1331, 1332 and 2101, together with Rule 38, 5(b) of this Court.

Time for applying for certiorari to Supreme Court of the United States begins from the date of the overruling of motion for rehearing. *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498, 72 L. Ed. 393; *U. S.* v. *Seminole Nation*, 299 U. S. 417, 81 L. Ed. 316; *Department of Banking, State of Nebraska* v. *Pink*, 317 U. S. 264, 87 L. Ed. 254, rehearing denied, 318 U. S. 802, 87 L. Ed. 1166; *U. S.* v. *Ellicott*, 223 U. S. 524, 56 L. Ed. 535; *Kingman & Co.* v. *Western Mfg. Co.*, 170 U. S. 675, 42 L. Ed. 1192; *Aspen Mining & Smelting Co.* v. *Billups*, 150 U. S. 31, 37 L. Ed. 986; *Morse* v. *U. S.*, 270 U. S. 151, 70 L. Ed. 518.

III

Grounds of Jurisdiction

(1) The Court of Appeals has decided an important question of Federal law in a way in conflict with the decisions of this Court.

(2) The Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions.

(3) The Court of Appeals has rendered a decision contrary to the laws and public policy of the State of Mississippi.

IV

Statement of the Case

The question presented in this case is as to whether or not the Court of Appeals committed error in reversing the judgment of the District Court of the United States for the Northern District of Mississippi, in which Court the respondent's complaint was dismissed and denying petition for rehearing.

The respondent, Interstate Realty Company, a Tennessee corporation, filed suit in the United States District Court for the Northern District of Mississippi against the petitioner, an adult resident of such district (Tr. 1). The suit was brought to recover from the petitioner commissions which the respondent claimed were owing to it for bringing about sales of real estate belonging to the petitioner in the State of Mississippi. The amount involved, exclusive of interest and costs, exceeded $3,000.00. The petitioner, in answer to the complaint, alleged that the respondent, a foreign corporation, without becoming domesticated and without qualifying to do business in the State of Mississippi, transacted business in the state out of which transactions the cause of action arose and that, therefore, the contracts entered into between the petitioner and the respondent were null, void and unenforceable in the State of Mississippi, that such contracts were contrary to the law and public policy of the State of Mississippi and no suit could be maintained thereupon, and that the petitioner had a defense thereto. The relevant Mississippi statutes regulating the right of a foreign corporation to transact business in the state will be found in Section 5319, Mississippi Code

of 1942, Appendix 5 hereto; Section 5339, Mississippi Code of 1942, Appendix 6 hereto; Section 5343, Mississippi Code of 1942; Appendix 7 hereto; and Section 5344, Mississippi Code of 1942, Appendix 8 hereto.

The petitioner, under the Federal Rules, requested of respondent admission of certain relevant facts based upon uncontroverted statements contained in the pleadings and admissions of record (Tr. 61-63). Thereupon, petitioner moved for a summary judgment (Tr. 67). The District Judge held that in entering into the contract sued upon, the respondent was engaged in business in the State of Mississippi and that the respondent had not qualified to do business in the State as provided by the statutes thereof and that, therefore, the contracts sued upon were utterly void, that no suit could be maintained in the State, and that the same were therefore not enforceable in the District Court of the United States (Tr. 70-72). Accordingly, the motion for summary judgment on the part of the petitioner was granted and judgment entered dismissing respondent's complaint (Tr. 72). An appeal was taken therefrom to the Court of Appeals, Fifth Circuit. That court held that under the laws and statutes of the State of Mississippi, the contracts sued upon were not absolutely void but only unenforceable in the state court. Accordingly, the court reversed the decision of the District Judge and held that the same might be maintained in the District Court for the Northern District of Mississippi. The case is reported in *Interstate Realty Company* v. *Woods*, 168 Fed. (2d) 70. The court uses the following language:

> "But the prohibition in the State law closing the doors of the State courts extends no further than the State courts. The State of Mississippi is without authority to limit or extend the jurisdiction of the Federal courts. If diversity of citizenship exists, the fact that a foreign corporation may not sue in the State

courts because it has not complied with the conditions of doing business within the State does not shut the doors of the Federal court sitting in that State. See David Lupton's Sons Co. *v.* Automobile Club of America, 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699; McLean *v.* York Oil Field Supply Co., Inc., 5 Cir., 138 F. 2d 804; Butler Bros. Shoe Co. *v.* U. S. Rubber Co., 8 Cir., 156 F. 1; Groton Bridge & Mfg. Co. *v.* Amer. Bridge Co., C. C. N. Y., 151 F. 871, 876, 877.

"We therefore hold that the appellant has the right to sue on its contract in the Federal District Court sitting in Mississippi.

"The judgment appealed from is reversed."

The petitioner filed a petition for rehearing which was granted October 22, 1948, and is reported 170 Fed. (2d) 74. Upon consideration thereof, the Court of Appeals adhered to its former opinion reversing the judgment of the District Court for the Northern District of Mississippi. The opinion was filed November 26, 1948, and is reported 170 Fed. (2d) at page 694. This Court granted certiorari February 7, 1949.

V

Errors Relied On for Reversal

The petitioner assigned and relies upon the following errors for reversal of this case:

(1) The Court of Appeals committed error in reversing the decision of the United States District Court for the Northern District of Mississippi which court had dismissed respondent's complaint.

(2) The Court of Appeals committed error in holding that the contracts sued upon by the respondent were enforceable in the United States District Court for the Northern District of Mississippi.

(3) The Court of Appeals committed error in failing and refusing to hold that the contract sued upon, having been entered into in the State of Mississippi by the respondent, were therefore in violation of the statutes and public policy of the State of Mississippi and unenforceable in the District Court of the United States.

VI

Statutes Involved

(A) This case involves a construction of Section 725, Title 28, U. S. C. A., containing the following language:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

(B) Section 5319, Mississippi 1942 Code, made Appendix 5 to this brief.

(C) Section 5339, Mississippi Code of 1942, made Appendix 6 to this brief.

(D) Section 5343; Mississippi Code of 1942, made Appendix 7 to this brief.

(E) Section 5344, Mississippi Code of 1942, made Appendix 8 to this brief.)

VII

ARGUMENT

Point I

The Court of Appeals has decided an important question of Federal law contrary to applicable decisions of this Court and to the law and public policy of the State of Mississippi.

This case is before the Court on certiorari to the Court of Appeals of the Fifth Circuit and involves the question

as to whether or not a foreign corporation transacting business in the State of Mississippi without qualifying in violation of its laws and public policy may maintain suit in the Federal Court upon contracts entered into in the State of Mississippi which contracts are illegal, contrary to the laws and public policy thereof and, consequently, void and unenforceable.

Section 5319, Mississippi 1942 Code, Appendix 5 hereto, provides that every foreign corporation before doing business in the State shall appoint an agent upon whom service of process may be had, and that any foreign corporation failing to comply with this provision shall not be permitted to bring or maintain any action or suit in any of the courts of the State.

Section 5339, Mississippi 1942 Code, Appendix 6 hereto, provides how a foreign corporation may become domesticated.

Section 5343, Mississippi 1942 Code, Appendix 7 hereto, prohibits any corporation from transacting business in the State without compliance with the statute by filing a duly certified copy of its articles of incorporation, etc., and the act provides for a fine of $100.00 for violation of the act.

Section 5344, Mississippi 1942 Code, Appendix 8 hereto, contains the following language:

> "And the acts of the agents of any such foreign corporation shall have the same force and validity as the acts of agents of private persons; but such foreign corporations shall not do or commit any act in this State contrary to the laws of policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy."

In the case of *Quartette Music Co.* v. *Haygood*, 108 Miss. 755, 67 So. 211, in determining the question involved here, the court used the following language:

"A long line of decisions of this court support the judgment of the learned trial judge.

"Section 935, Code of 1906, provides that:

"'Every * * * corporation for profit incorporated under or by virtue of the laws of * * * any other state * * * shall file in the office of the secretary of state a copy of its charter of incorporation.'

"The statute further provides that:

"Any 'foreign corporation which shall not file a copy of its charter or certificate of articles of incorporation * * * shall be liable to a fine of not less than one hundred dollars.'

"In Bohn *v.* Lowery, 77 Miss. 427, 27 So. 605, this rule is approved:

"'Every contract made for, or about, any matter or thing which is prohibited and made unlawful by any statute, is a void contract though the statute itself does not mention that it shall be so, but only inflicts a prohibition, though there are no prohibitory words in the statute.'

"There are some decisions in our books which apparently conflict with this rule, but they were all overruled by Woodson *v.* Hopkins, 84 Miss. 171, 37 So. 1000, 38 So. 298, 70 L. R. A. 645, 107 Am. St. Rep. 275."

The court expressly approved the case of *Bohn* v. *Lowery*, 77 Miss. 427, 27 So. 605, in which case a physician practiced medicine in the state without procuring a license which failure was punishable as a misdemeanor.

The latest case in the Supreme Court of Mississippi dealing with the subject matter is *Newell Contracting Co.* v. *State Highway Commission*, 195 Miss. 395, 15 So. (2d) 700, where the court said:

"We are of the opinion that the court below was correct in holding that the appellant was doing busi-

ness in this State and that there had been no substantial compliance with the statutes here involved until September 16, 1933, and that hence the contract sued on is void and unenforceable. Quartette Music Co. *v.* Haygood, 108 Miss. 755, 67 So. 211; Peterman Construction & Supply Co. *v.* Blumenfeld, 156 Miss. 55, 125 So. 548; Wiley Electric Co. *v.* Electric Storage Battery Co., 167 Miss. 842, 147 So. 773; Marx & Bensdorf, Inc. *v.* First Joint Stock Land Bank of New Orleans, 178 Miss. 345, 173 So. 297; Case *v.* Mills Novelty Co., 187 Miss. 673, 193 So. 625, 126 A. L. R. 1102."

In the case of *David Lupton Sons Co.* v. *Automobile Club of America*, 225 U. S. 489, 56 L. Ed. 1177, Ann. Cas. 1914A, this Court held that a New York statute which prohibited a foreign corporation from filing suit in a State court unless it presented to the court a certificate to the effect that it had qualified to do business in the State of New York could not maintain a suit in the State court. This Court held that the New York statute did not prevent a foreign corporation from enforcing an obligation entered into in violation of the statute in the United States District Court in New York. This Court held that the prohibition extended no further than closing the State court to the foreign corporation. It must be borne in mind, however, that the New York statute did not make the transacting of business by an offending foreign corporation a crime nor did the State of New York have a general statute such as Section 5344, Mississippi Code of 1942, providing that a foreign corporation committing any act contrary to the laws or policy thereof shall not be allowed to recover on any contract made in violation of law or public policy.

Beginning with the case of *Swift* v. *Tyson*, 16 Pet. 1, 18, 10 L. Ed. 865, 871, this Court held that the Federal Court sitting in a State was at liberty to investigate and determine the common law for itself. This rule prevailed for

many years, and until the decision of the court in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487. There, a cause of action in tort which arose in the State of Pennsylvania was the subject of suit in the State of New York, and following the case of *Swift* v. *Tyson*, the District Court of New York held that the common law of the forum would control.

This Court reversed the decision of the Second Circuit, and in so doing held that there was no general common law of the Federal courts, but that the common law of the state would be applied. The court used the following language:

> "Experience in applying the doctrine of Swift *v.* Tyson, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties. . . .
>
> "On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. Swift *v.* Tyson introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State . . . ."

However, in this case, the right of the respondent to recover and the defense of the petitioner is predicated under Section 34 of the Judiciary Act of 1789, being Section 725, U. S. C. A., Title 28, which provides that the laws of the several states shall be regarded as rules of decision in the courts of the United States while in the case of *Swift* v. *Tyson* this Court held that the word "laws" as used in the statute did not embrace decisions of local tribunals but had reference to the positive statute of the state and the construction thereof adopted by the local tribunals. Under the Judiciary Act of 1789, the Federal courts were thus under obligation to follow state decisions in their interpretation of state statutes in regard to matters of a strictly local character.

This case does not depend upon the case of *Erie Railroad Company* v. *Tompkins*, but is determinable upon the construction of the Judiciary Act of 1789 hereinbefore set out. The question was most recently examined by this Court in the case of *Dr. Furman Angel* v. *W. H. Bullington*, 330 U. S. 183, 91 L. Ed. 832. In that case a North Carolina statute prohibited suit for recovery of a deficiency judgment on a mortgage indebtedness. Suit was filed by the respondent in the state court and on account of the state statute met an adverse judgment whereupon the respondent plaintiff filed suit in the United States District Court in the State of North Carolina on the theory that the contract was not void but merely unenforceable in a North Carolina state court and, since diversity of citizenship existed, relied upon the *Lupton* case that suit might be maintained in the Federal District Court. This Court held, in the first place, that the respondent plaintiff, not having appealed from the judgment rendered in the state court, was bound thereby; that the same was *res adjudicata*. The Court further held that the Federal court sitting in the

State of North Carolina was another court of the state and that no suit could be maintained in the Federal court based upon diversity of citizenship unless the suit could be maintained in the state court. The Court used the following language:

> "It is suggested that the North Carolina Supreme Court construed the North Carolina statute to close only the North Carolina State courts but not the federal court sitting in North Carolina. In the first place, the North Carolina Supreme Court said no such thing. It construed that statute expressive of State policy and spoke only of the jurisdiction of the State courts because it was concerned only with the State courts. Secondly, it is most incongruous to attribute to the legislature and judiciary of North Carolina the imposition of a restriction against all its citizens from suing for a deficiency judgment, while impliedly authorizing citizens of other States to secure such deficiency judgments against North Carolinians. Thirdly, a North Carolina statute, upheld by the highest court of North Carolina, is of course expressive of North Carolina policy. The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. North Carolina would hardly allow defeat of a Statewide policy through occasional suits in a federal court. What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens.
>
> "Cases like David Lupton's Sons Co. *v.* Automobile Club, 225 U. S. 489, 56 L. Ed. 1177, 32 S. Ct. 711, Ann.

Cas. 1914A 699, are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with Erie R. Co. *v.* Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487. That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts."

The Court of Appeals in reconsidering petition for rehearing committed error in stating that the announcement of the court in the *Bullington* case to the effect that the *Lupton* case, and other similar cases were obsolete was merely argumentative. The decision of the court in the *Bullington* case was placed upon two grounds, either of which afforded a sufficient basis for the court's decision. In the first instance, the court held that the judgment in favor of the petitioner rendered in the state court was *res adjudicata* and that the decision was binding upon the respondent as to all questions actually decided or which might have been included. However, the court, irrespective of that question, since jurisdiction was based upon diversity of citizenship, held that since the action was one which could not be maintained in the state court, no action could be maintained on the same cause of action in the federal court. It is very true that the court might have based its decision entirely upon the grounds of *res adjudicata* but that was a question for the court to decide. It is not unusual for this and other courts to base decisions upon more than one ground, either of which would afford a sufficient basis therefor. Neither of the court's announcements may be disregarded. The language used by this Court in respect to the *Lupton* case being obsolete was in direct response to the decision of the Court of Appeals, Fourth Circuit, 150 Fed. (2d) 679, which affirmed the judgment of the District Court. Neither the Court of Appeals

for the Fourth Circuit nor the decision of the District Judge, 56 Fed. Supp. 372, made any reference whatsoever to the question of the finality of the judgment of the North Carolina State court. In both courts, the decisions were based entirely upon the holding that the statute of the State of North Carolina only limited the jurisdiction of the state court and did not prevent the federal court from exercising jurisdiction, citing the *Lupton* case. When the case reached this Court on certiorari, counsel for petitioner, as will appear from the brief, urged upon the Court the theory that the respondent was barred by the judgment rendered in the state court and, in the alternative, presented fully the view that if the North Carolina statute was valid, it was binding upon both the federal and the state courts, citing *Erie Railroad Co.* v. *Tompkins* and *Guaranty Trust Co.* v. *York*. Upon the other hand, respondent's counsel fully presented the view, first, that the doctrine of *res adjudicata* had no application in the case and, in the alternative, that the case of *Erie Railroad Co.* v. *Tompkins* was not pertinent, invoking the Federal Judiciary Act of 1789.

The holding of this Court in respect to the *Lupton* case was in direct response to the opinions of the Court of Appeals, Fourth Circuit, and the District Judge, as well as to the arguments of counsel of the petitioner and the respondent. It is interesting to note that the Court of Appeals for the Fourth Circuit in its opinion distinguished and therefore refused to follow the case of *Guaranty Trust Company of New York* v. *York*, 326 U. S. 99, 89 L. Ed. 2079, 160 A. L. R. 1231, on the ground that there the cause of action arose under the law of the state in which the action was brought whereas in the *Bullington* case the cause of action was based upon a contract executed under the laws of another state. No such distinction could be predicated in the present case.

The case of *Guaranty Trust Co. v. York, supra*, is a direct authority and is a controlling authority in this case, and stems from the Federal Act of 1789. In that case, a suit in equity was filed in the United States District Court for the State of New York by the respondent, York. The position taken in the suit was that, since the cause of action was one in equity, the six-year statute of limitations plead by the petitioner in bar of the action was not applicable; that, upon the other hand, the question of the statute of limitations was a remedial matter of procedure, and that since the respondent had no adequate remedy at law, but had the right to go into a court of equity, it was asserted that the New York statute of limitations would not be applicable. The Supreme Court of the United States reversed the decision of the Second Circuit, and used the following language:

> "Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course 'substance' and 'procedure' are the same key-words to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. See Home Ins. Co. *v.* Dick, 281 U. S. 397, 409, 74 L. Ed. 926, 934, 50 S. Ct. 338, 74 A. L. R. 701. And the different problems are only distantly related at best, for the terms are in common use in connection with situations turning on such different considerations as those that are relevant to questions pertaining to ex post facto legislation, the impairment of the obligations of contract, the enforcement of federal rights in the State courts and the multitudinous phases of the conflict of laws. See, e. g., American R. Exp. Co. *v.* Levee, 263 U. S. 19, 21, 68 L. Ed. 140, 143, 44 S. Ct. 11; Davis *v.* Wechsler, 263 U. S. 22, 24, 25, 68 L. Ed. 143, 145, 146, 44 S. Ct. 13; W. B. Worthen Co. *v.* Kavanaugh, 295 U. S. 56, 60, 79 L. Ed. 1298, 55 S. Ct. 555, 97 A. L. R. 965;

Garrett v. Moore McCormack Co., 317 U. S. 239, 248, 249, 87 L. Ed. 239, 24 246, 63 S. Ct. 246; and see Tunks, Categorization and Federalism: 'Substance' and 'Procedure' After Erie Railroad v. Tompkins (1939), 34 Ill. L. Rev. 271, 274-276; Cook, Logical and Legal Bases of Conflict of Laws (1942), 163-165.

"Here we are dealing with a right to recover derived not from the United States but from one of the States. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identical. But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.

"And so, putting to one side abstractions regarding 'substance' and 'procedure', we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof. Cities Serv. Oil Co. v. Dunlap, 308 U. S. 208, 84 L. Ed. 196, 60 S. Ct. 201, as to conflict of laws, Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020, as to contributory negligence, Palmer v. Hoffman, 318 U. S. 109, 117, 87 L. Ed. 645, 651, 63 S. Ct. 477, 144 A. L. R. 719. And see Sampson v. Channell, 110 F. 2d 754. Erie R. Co. v. Tompkins has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts. A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties."

The Court also used the following language:

"Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility

to potential local bias. The Framers of the Constitution, according to Marshall, entertained 'apprehensions' lest distant suitors be subject to local bias in State courts, or, at least, viewed with 'indulgence the possible fears and apprehensions' of such suitors: Bank of the United States *v.* Deveaux, 5 Cranch (US) 61, 87 3 L. Ed. 38, 44. And so Congress afforded out-of-State litigants another tribunal, not another body of law. The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law. Certainly, the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident. The source of substantive rights enforced by a Federal court under diversity jurisdiction, it cannot be said too often, is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be held in equity."

The duty of Federal courts to follow State court decisions on the construction and application of State statutes antedates the decision in *Erie Railroad Company* v. *Tompkins* and the cases decided on that question since the decision present no novel situation and are merely cumulative of those decided before. The decision in *Erie Railroad Company* v. *Tompkins* left that rule untouched as it prevailed under the doctrine of *Swift* v. *Tyson* and both before and after the decision in the *Tompkins* case, the Federal court were and now are bound by the decisions of the highest court of the State in the construction of a state statute. The case of *Guaranty Trust Company* v. *York* and *Angel* v. *Bullington* are in accord therewith as will appear from the following cases:

In the case of *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 85 L. Ed. 109, where the court had under consideration a statute of the State of New Jersey, the court used the following language:

> "The question has practical aspects of great importance in the proper administration of justice in the Federal courts. It is inadmissible that there should be one rule of State law for litigants in the State courts and another rule for litigants who bring the same question before the Federal courts owing to the circumstance of diversity of citizenship."

In the case of *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 85 L. Ed. 139, 132 A. R. L. 956, the Court used the following language:

> "But the obvious purpose of sec. 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the State courts, the other to be availed of in the Federal courts, only in case of diversity of citizenship. That object would be thwarted if the Federal courts were free to choose their own rules of decision whenever the highest court of the State has not spoken."

In the early case of *United States* v. *Reid*, 53 U. S. 361, (12 How.), 13 L. Ed. 1023, it was held that Sec. 725 was necessarily intended to confer on Federal courts jurisdiction necessary to enable them to administer state laws.

In the case of *Nichols* v. *Atcheson T. & S. F. Railway Co.*, 264 U. S. 348, 68 L. Ed. 720, it is held that where a case is removed from the State to the Federal court, it is governed by exactly the same rule which would have controlled it in the State court.

In the case of *Bowditch* v. *City of Boston*, 101 U. S. 16, 25 L. Ed. 980, this Court held that in determining the liability of a municipality a State statute involved questions

of local law and the Court was required to determine the controversy as if it were a court of the State sitting there to apply her jurisprudence.

The courts of the United States held in a State are administering the laws of that State and bound by the rules governing State courts. *Asplind* v. *Nixon*, 4 How. 467, 11 L. Ed. 1059.

See also *Allison* v. *Great Atlantic & P. Tea Co.* (1938; C. C. A. 4th) 99 F. (2d) 507; *Tobin* v. *Hymers* (1938; C. C. A. 9th) 99 F. (2d) 740; *American Nat. Ins. Co.* v. *Belch* (1938; C. C. A. 4th) 100 F. (2d) 48; *Jones* v. *New York Casualty Co.* (1938; D. C.) 23 F. Supp. 932, infra, IV. b. See also *Winder* v. *Consolidated Underwriters* (1938, D. C.) 25 F. Supp. 451, infra, XIII., and *Leslie* v. *Johnson* (1938; D. C.) 24 F. Supp. 406, supra, II.

Respondent's counsel takes the view that transacting business in the State of Mississippi by the respondent and entering into contracts sued upon was not a violation of the public policy of the State of Mississippi. Section 5319, made Appendix 5 hereto, requires a foreign corporation to appoint an agent for service of process and any corporation failing to comply therewith is prohibited from bringing or maintaining an action in any of the courts of the State. Section 5343 of the Mississippi Code, made Appendix 7 hereto, requires a foreign corporation to file a certified copy of its charter before transacting business within the State and for a violation thereof is subject to a fine of $100.00. Section 5344 of the Mississippi Code, Appendix 8 hereto, provides that a foreign corporation committing any act in the State contrary to the laws of policy thereof should not be permitted to recover thereupon. In order to ascertain the public policy of the State, it is necessary to look at its statutes and judicial decisions. This question was expressly decided against respondent by the Supreme Court

of Mississippi in the case of *State ex rel. Attorney-General v. Edward Hines Lumber Co. et al.*, 106 Miss. 780, 64 So. 729. In that case it appeared that Section 903, Mississippi 1906 Code limited the amount of property which any domestic corporation might own and provided a penalty therefor. The appellee in that case, a foreign corporation, acquired and owned property in excess of the statutory limit. Suit was brought by the Attorney-General to confiscate the property and was met with the defense that the prohibition applied only to domestic corporations and that a foreign corporation was not therein included. A copy of Section 903, Mississippi 1906 Code, is made Appendix 9 hereto. The Supreme Court of Mississippi, construing Section 849 of the Code of 1892 and Section 914 of the Code of 1906, said sections being in identical language with Section 5344, Mississippi Code of 1942, made Appendix "D" to the Petition for Certiorari, held that the appellee, a foreign corporation, was included within the prohibition and violated the public policy of the State of Mississippi. The court used the following language:

> "It seems clear to us that, inasmuch as foreign corporations 'may not do or commit any act in this state contrary to the laws or the policy thereof', it necessarily follows that such corporations may not do in this State what domestic corporations are prohibited from doing. The policy of this State with reference to limitations upon the value of corporate holdings is expressed in our statutes, and while it may be said that section 849 of the Code of 1892 and section 914 of the Code of 1906 are declaratory of the common-law rule of comity, yet it seems to us that, the laws and policy of this State being to limit the value of the holdings of domestic corporations, and to penalize domestic corporations for exceeding the statutory limit, it was the intention of the legislature to apply to foreign corporations the same limitations; otherwise, this policy could be

thwarted by the simple expedient of incorporating in other states.

"If the limitation is not an expression of the State's policy, binding upon all corporations and enforceable by a proper proceeding, foreign corporations would be free to gobble up all of the lands of the State, and thus defeat the effort of the legislature to carry out a wise and salutory purpose, clearly indicated by statutes forbidding corporations subject to its control from acquiring lands in excess of a fixed limit of value. There can be no doubt of the legislative intention to limit the size of corporations in this State, and it is difficult to imagine what laws and policies are referred to in section 849, Code 1892, and section 914, Code 1906, unless we construe these sections to mean that foreign corporations doing business here may also be forced to conform to the policy of the State, expressed in its statutes."

In the case of *United States* v. *Musgrave*, 160 Fed. 700, the Court used the following language:

"The public policy of the government is not limited to such matters as are universally considered as injurious to the public interests, but any acts reasonably calculated to have that effect may be prohibited by statute, and thereupon they are against public policy. United States *v.* Freight Association, 166 U. S. 290, 340, 17 Sup. Ct. 540, 41 L. Ed. 1007; Logan & Bryan *v.* Postal Tel. Co. (C. C.) 157 Fed. 570, 587.

"In the Freight Association Case the court, speaking by Mr. Justice Peckman, said on the subject:

"'The public policy of the government is to be found in its statutes, or when they have not yet spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts.'"

In the case of *Angel* v. *Butlington*, 330 U. S. 183, 91 L. Ed. 832, the Court held that a State statute upheld by the highest court of the State is expressive of the public policy of the State. In support of this principle, respondent cites the case of *C. B. & Q. Ry. Co.* v. *Maguire*, 219 U. S. 549, 55 L. Ed. 328, where the following language is used:

> "The legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the State. While the court, unaided by legislative declaration and applying the principles of the common law, may uphold or condemn contracts in the light of what is conceived to be public policy, its determination as a rule for future action must yield to the legislative will when expressed in accordance with the organic law * * *"

Counsel cite the case of *May* v. *Mulligan*, 36 F. Supp. 596, upon the question of public policy. The following rule is announced at Page 598:

> "'The public policy of a State, established either by express legislative enactment or by the decisions of its courts, is supreme and when once established will not, as a rule, be relaxed even on the ground of comity to enforce contracts, which, though valid where made, contravene public policy.
>
> "'Courts which declare a contract void as against public policy are not declaring the intention of the parties, as in the ordinary case, but are acting under the obligation of the higher law, which requires the enforcement of that which is for the public good. * * *'"

In the case of *Tademy* v. *Scott*, Fifth Circuit, 157 Fed. (2d) 826, the court held that the public policy of the State must be ascertained by consulting the statutes of the State.

In the case of *Bank of Augusta* v. *Earl*, 13 Pet. 519, 10 L. Ed. 274, this Court held that the public policy of a State is to be found in its statutes.

In the case of *New York Life Insurance Company* v. *Craven*, 178 U. S. 349, 46 L. Ed. 1116, this Court held that the public policy of a State is to be found in its statutes and decisions of its courts which are binding upon the Federal court. The same is held in the case of *Hartford Fire Insurance Company* v. *Chicago M. & St. Paul Railroad Co.*, 175 U. S. 91, 44 L. Ed. 84.

Respondent's counsel present the view that the Mississippi statutes are purely for the purpose of collecting revenue. These statutes were enacted in the exercise of the police power of the State. It had the right absolutely, either with or without reason, to exclude a foreign corporation from doing business in the State. *Atlantic Refining Company* v. *Virginia*, 302 U. S. 22, 82 L. Ed. 24; *State of Washington ex rel.* v. *Superior*, 289 U. S. 361, 77 L. Ed. 1256; *Hartford Fire Insurance Company* v. *Carr*, 272 U. S. 494, 71 L. Ed. 372.

A foreign corporation is required to file copy of its charter in order to furnish evidence of its existence, the officers and incorporators, its financial condition, and to protect parties dealing with said corporation from fraud and imposition. *Evans* v. *Lee* (Nev.) 11 Nev. 194; *Cochran* v. *Kingsley*, 25 Col. App. 89; *Dearborn Foundry Company* v. *Augustine*, 5 Wash. 67, 31 Pac. 327.

The purpose of requiring appointment of an agent for service of process is to provide definite means of obtaining the service of process on the foreign corporation. *Dearborn Foundry Company* v. *Augustine*, 5 Wash. 67, 31 Pac. 527; *Hosteter* v. *Jewel*, 73 Iowa 169, 39 Pac. 194; *Zochrim* v. *Redemption Gold Corporation*, 200 Minn. 383, 274 N. W. 536; *Alcorn Combustion* v. *Kellogg*, 295 Pa. 232, 145 Atl. 325; *Oklahoma Packing Company* v. *Oklahoma Gas & Electric Company*, 100 Fed. (2d) 770, Affirmed 309 U. S. 4, 84 L. Ed. 537.

Section 5344, Mississippi 1942 Code, is plain, unambiguous and all embracing. A contract entered into in violation of the laws of the State is unenforceable in any court. The respondent confessedly violated Sections 5319 and 5343, Mississippi 1942 Code, in making contracts sued on and, therefore, the contracts were made in violation of law and in violation of the public policy of the State. Therefore, the contracts sued upon are not enforceable either in the State or Federal court and the petitioner, for a defense thereto in the State court, may not be deprived thereof by removal of the case to the Federal court or instituting this suit in the Federal court.

POINT II

The contracts sued upon are unenforceable in the federal court whether the contracts are absolutely void or merely unenforceable because of the failure of the respondent to qualify to do business in the state.

Under the Act of 1789 in F. S. C. A. 28, 725, as construed in *Swift* v. *Tyson*, the Federal court sitting in the State was obliged to give effect to State statutes and local laws. The case of *Erie Railroad Company* v. *Tompkins* broadened the scope of inquiry to be had in the Federal court as to the State law.

In the case of *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 204, 82 L. Ed. 1290, the court used the following language:

> "'Application of the 'State law' to the present case, or any other controversy controlled by *Erie R. Co.* v. *Tompkins*, does not present the disputants with duties difficult or strange. The parties and the Federal courts must now search for and apply the entire body of substantive law governing an identical action in the State courts. Hitherto, even in what were termed

> matters of 'general' law, counsel had to investigate the enactments of the State legislature. Now they must merely broaden their inquiry to include the decisions of the State courts, just as they would in a case tried in the State court, and just as they have always done in actions brought in the Federal courts involving what were known as matters of "local' law."

Narrowing the issues to the least common denominator, the precise question presented is as to whether or not the respondent might have recovered upon the contracts in question in the State court. It being conceded that no such recovery could be had, it is immaterial whether contracts are absolutely void or merely unenforceable. The respondent could not walk across the street to the Federal court and obtain the benefit of a different system of jurisprudence. The respondent could not escape the Mississippi statutes and public policy of the State by going into the Federal court. There is but one exception to this rule and that is that a statute would not be in force in the Federal court which was purely procedural. In the Mississippi statutes is found the substantive law of the State upon the question. Under such statutes, the respondent may not enforce the contracts either in the State or the Federal court. The petitioner has a complete defense thereto in either court. This cause is foreclosed in the case of *Guaranty Bank & Trust Co.* v. *York*. In Stumber, Conflict of Laws, 128, the following rule is announced:

> "It may be stated thus: procedural rules are those which concern methods of presenting to a court the operative facts upon which the legal relations depend; substantive rules, those which concern the legal effect of those facts after they have been established."

Procedural involves the methods of continuing litigation and judicial procedures. *Brenizer* v. *Nashville R. R. Co.*,

156 Tenn. 479, 3 S. W. (2d) 1053, 8 S. W. (2d) 1099. Procedural is merely the machinery for carrying on a suit, *Taylor* v. *Reg.* 1 Can 65. Substantive law relates to rights and duties which give rights to a cause of action. Procedural is the machinery for carrying on the suit. *Jones* v. *Erie R. R. Co.*, 106 Ohio State, 408, 140 N. E. 366. In the case of *State* v. *Pavelich Washington*, 279 Pac. 1102, the distinction is drawn in the following language:

> "Although the distinction between procedure and substantive law is not always well understood, and is sometimes vague and indistinct, substantive law is well defined in *Nix* v. Nez Perce County, 18 Ida. 695, 112 P. 215, 32 L. R. A. N. S. 534, as that part of the law which creates, defines and regulates rights as opposed to adjective or remedial law, which prescribes the method of enforcing rights, or of obtaining redress for their invasion. It is difficult, therefore, to draw the line in any particular case, beyond which legislative power, over remedy and procedure, cannot pass without touching upon the substantial rights of the parties affected, as it is impossible to fix that boundary by any general condition."

In the case of *Lachman* v. *Penn. Greyhound Lines, Inc.* (2d Cir.), 160 Fed. (2d) 496, the court said:

> "The line between substance and procedure is not so clearly marked as to be free from doubt in all cases, and the decisions have been influenced by the desire to effectuate the spirit of the doctrine of Erie R. Co. v. Tompkins so as to secure uniformity in the results to be obtained in the State courts and in the Federal courts in diversity cases in each State. This is especially desirable when the remedial law of the State is so closely associated and incorporated with its substantive law as to be necessary in order to maintain and validate the latter. Precourt v. Driscoll, 85 N. H. 280, 157 A. 525, 78 A. L. R. 874."

In *Guaranty Trust Company* v. *York*, 326 U. S. 99, 89 L. Ed. 2079, the court held that a State statute of limitations was substantive law.

In the case of *Palmer* v. *Hoffman*, 318 U. S. 109, 87 L. Ed. 645, 145 A. L. R. 719, the court held that the burden of proof was part of the substantive law of the State.

In the case of *Stone* v. *New York Life Insurance Co.*, 311 U. S. 464, 85 L. Ed. 284, the court held that whether or not there was sufficient proof to justify a recovery was a matter of substantive law of the State.

In the case of *Central Vermont Railway Company* v. *Mary Theresa White*, 238 U. S. 507, 59 L. Ed. 1433, Mr. Justice Lamar used the following language announcing the rule that the burden of proof was part of the substantive law of the State:

> "But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of State procedure. For, in Vermont, and in a few other States, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further, and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those states the plaintiff is as much under the necessity of proving one of these facts as the other; and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action."

A very interesting case is that of *John Hancock Mutual Life Insurance Company* v. *Yates*, 299 U. S. 178, 81 L. Ed. 106. In that case the respondent's husband took out a policy of life insurance in which the respondent was named

as beneficiary. He made an application in which false representations were made in regard to his having been treated by a physician prior to applying for the policy. The insured died very soon after the policy was taken out and the beneficiary, the respondent, moved to the State of Georgia, where suit was brought upon the policy. Under the statutes of the State of New York as construed by its highest appellate court, the policy and the application therefor constituted the entire contract between the parties and oral testimony was not admissible to show that correct answers were given to the agent who took the insured's application but that such answers were not correctly taken down. The plaintiff was permitted to prove that the insured made correct answers to the application but that the same were not correctly written down by the company's agent. Judgment was recovered by the respondent, plaintiff, which judgment was affirmed by the highest appellate court of the State upon the theory that the question was merely one of procedure governed by the laws of the forum. This Court granted certiorari and, in reversing the case, the court held that the life insurance company was entitled to the benefit of the substantive law of the State of New York. The court used the following language:

> "The reasoning of the Georgia Court, and the conclusion reached by it, are not sound. No question of remedy is presented. The Company sets up as a defense a substantive right conferred by a statute of New York. The contract of insurance was made and the death of the insured occurred in that State. In respect to the accrual of the right asserted under the contract, or liability denied, there was no occurrence, nothing done, to which the law of Georgia could apply. Compare Home Ins. Co. *v.* Dick, 281 U. S. 397, 408, 74 L. Ed. 926, 933, 50 S. Ct. 338, 74 A. L. R. 701. To sustain the defense involves merely recognition by the courts of Georgia that the parties have by their con-

tract made in New York subjected themselves to certain conditions prescribed by its statute. Such recognition does not give to the New York statute extra-territorial effect. The statute of New York prescribes, or limits, the things which will be effective to create binding contracts of insurance, or terms in them. As construed by the highest court of the State, the statute makes the policy with the application annexed the entire contract between the parties. And it declares that a false answer in the application to the precise question here involved is a material misrepresentation which avoids the policy; and that the fact that a truthful answer was orally given to the agent but not recorded is without legal significance. In so declaring, the statute enacts a rule of substantive law which became a term of the contract, as much so as the amount of the premium to be paid or the time of its payment. The declaration by the statute as construed and applied by the highest court of New York that the false answer here involved is a material misrepresentation which avoids the policy determines the substantive rights of the parties as fully as if a provision to that effect had been embodied in writing in the policy. To refuse to give that defense effect would irremediably subject the Company to liability."

It is very true that the court gave effect to the constitutional provision that full faith and credit should be given in the State of Georgia to the laws and the statutes of the State of New York which carried with it, however, the conclusion that the rights under the New York statute as to the admission of the evidence under the New York laws was not procedural but created substantive rights.

Now neither may it be said that the Mississippi statute merely precluded action in the State court. It is very true that Section 5319, Mississippi 1942 Code, provides that the foreign corporation failing to comply should not be permitted to bring or maintain an action or suit in any of the

courts of the State. At the time this statute was passed, and for many years prior thereto, the authorities uniformly held that the Federal court was a State court in the District in which it sat.

Ex Parte Schoenberger, 96 U. S. 369, 24 L. Ed. 853; *Great Southern Life Insurance Co.* v. *Burwell* (5th Cir.), 12 Fed. (2d) 244.

In the case of *Sullivan* v. *Title Guarantee and Trust Company* (2d Cir.), 167 Fed. (2d) 393, the court used the following language:

> "As we have been often advised, a federal court in a diversity suit 'should adjudicate controversies as it were only another state court'. Vanston Bondholders Protective Committee *v.* Green, 329 U. S. 156, 162, 67 S. Ct. 237; Holmberg *v.* Armbrecht, 327 U. S. 392, 394, 66 S. Ct. 582, 90 L. Ed. 743, 162, A. L. R., 719; Guaranty Trust Co. *v.* York, 326 U. S. 99, 108, 109, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A. L. R. 1231."

In the case of *Holmberg v. Armbrecht*, 327 U. S. 392, 90 L. Ed. 743, at Page 746, the court announced the following rule:

> "For purposes of diversity suits a Federal court is, in effect, 'only another court of the State'. Guaranty Trust Co. *v.* York, supra (326 U. S. at 108, 89 L. Ed. 2086, 65 S. Ct. 1464, 160 A. L. R. 1231)."

This argument, however, does not take into consideration Section 5344 of the Mississippi Code of 1942, which provides that where a foreign corporation violates the law or public policy of states, it may not sue in any court. The Mississippi statute involved in no manner restricts the jurisdiction of federal courts. No statute of Mississippi could prevent the respondent from going into the Federal court to enforce a right or from removing the

case from a State Court to the Federal Court. *Barrow v. Kane*, 170 U. S. 100, 42 L. Ed. 964; *Tom J. Terral v. Burk Construction Co.*, 257 U. S. 529, 66 L. Ed. 352, 21 A. L. R. 186; *Southern R. R. Co. v. Allison*, 190 U. S. 326. The Mississippi statutes did not prevent the respondent from filing a suit in the Federal Court. The respondent availed itself of its constitutional right to do so and was heard; however, when it filed its suit in Federal court, it was face to face with the state law, the same jurisprudence prevailed in the Federal court as would have confronted the respondent in the State court. It could not convert an unenforceable right of action into a valid cause of action by going across the street and filing its suit in the Federal court. There was no question of lack of jurisdiction but failure to have a cause of action.

In the case of *Wabash R. Co. v. Duncan* (8th Cir.) 170 Fed. (2d) 38, the following language is used at Page 41:

> "'Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence . . . It may undoubtedly be shown in defense that plaintiff has no right under the allegations of his bill or the facts of the case to bring suit, but that is no defect of jurisdiction, but of title'. Illinois Central Railroad Co. *v.* Adams, 180 U. S. 28, 34, 21 S. Ct. 251, 253, 45 L. Ed. 410. See also Walling *v.* Miller, 8 Cir., 138 F. 2d 629, 631, and cases cited."

The jurisdiction of the Federal court in this case was perfect. There was diversity of citizenship and a demand in good faith for an amount in excess of $3,000.00 exclusive of interest and costs. The question as to whether or not the respondent, a foreign corporation, had entered into contracts in Mississippi which were illegal and unenforceable because in violation of the laws and public policy of

the state was purely defensive. The respondent was afforded the opportunity and had the right to litigate and have the court determine as to whether or not it had transacted business in the state without qualifying. Its failure to recover had no relation to the jurisdiction of the court but rather the fact that the causes of action asserted were unenforceable and that the petitioner had a perfect defense thereto which he set up and established with proof. In no case construing its statutes has the Supreme Court of Mississippi held that the question was one of jurisdiction. If the respondent had recovered a judgment by default, the judgment would have been unassailable. The Supreme Court of Mississippi has never held that it was necessary for a foreign corporation to allege its compliance with the laws of the State of Mississippi and on a complaint containing no such allegation, it would be the duty of the defendant in its pleadings to set up such defense.

It may be very true that in the instant case the contract was enforceable at the instance of the petitioner. Ordinarily, the petitioner would have no knowledge that the foreign corporation had not complied with the laws of the state and would have the right to assume that it had done so. It would be under no duty to make inquiry in respect thereto. However, in the event that it should appear that the resident had procured the admission of the foreign corporation without its qualifying under the laws of the state, the Supreme Court of Mississippi has never held that a citizen of the state, under such circumstances, could enforce the contract against the foreign corporation. This point is well illustrated in the case of *Newell Construction Company* v. *State Highway Commission*, 15 So. (2d) 700, 195 Miss. 395, where suit was brought by an unqualified foreign corporation. The court held that although the

suit had been pending for three years and testimony had been taken for twenty days; the trial court committed no error in permitting the defendant to plead defensively the failure of the foreign corporation to qualify under the law. The court used the following language:

"Then, in the second place, it is strenuously urged that the trial court abused its discretion in permitting the amendment to be made so as to allow this defense to be interposed, for the reason that the leave to amend was not seasonably applied for. However, inasmuch as Section 4140 expressly requires that every foreign corporation doing business in the State of Mississippi shall file a written power of attorney designating the Secretary of State, or in lieu thereof some other resident agent, upon whom service of process may be had, before it is authorized to do business in this state, and further provides that 'Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state'; and since Section 4164 requires such a corporation to file a copy of its charter or articles of incorporation with the Secretary of State, and provides that 'any foreign corporation which shall not file a copy of its charter or certificate of articles of incorporation . . . shall be liable to a fine of not less than $100.00'; we are of the opinion that the defendant, State Highway Commission, had the right to assume, without making any investigation in that behalf, that the complainant, as such a foreign corporation, had complied with the plain mandates of the law in these particulars, and that therefore the trial court was not in error in permitting the amendment so as to allow the defense to be made so as to show that the contract sued on was wholly void and unenforceable, and this is especially true in the absence of a showing that the defendant had notice of the non-compliance with the statutes prior to the taking of the evidence by the complainant in

support of the allegations of its bill of complaint. When this suit was filed and the evidence was being taken, the complainant was charged with knowledge that it could not bring or maintain any action or suit in any of the courts of this state without having complied with these statutes before doing the business in this state, since it is presumed to have known, before it brought the suit or incurred any of the expense of the trial, all of the facts in connection with its failure to file a copy of its charter and designate an agent for the service of process as required by law.

"The decree of the court below must therefore be affirmed.

"Affirmed."

From this case, it appears that the question was not one of jurisdiction but was a defense to be pleaded by the defendant; that the party dealing with the foreign corporation had a right to assume that it complied with the laws of the state. It is apparent from the opinion, however, that if the defendant wished to take advantage of this defense and had knowledge of the facts, it should plead to the same promptly.

It may be noted that the Supreme Court referred to the contract of the foreign corporation as being *wholly void*. In the case of *Midland Linseed Products Company* v. *Warren Brothers Company*, Sixth Circuit, 46 Fed. (2d) 870, the court held that effect must be given to the latest decisions of the Supreme Court of the state.

We respectfully submit that the Court of Appeals committed error in reversing the judgment of the District Court for the Northern District of Mississippi and that the judgment of the Circuit Court of Appeals as well as its judgment adhering to its judgment of reversal should be re-

versed, the cause remanded, and the judgment of the District Judge reinstated and affirmed.

Respectfully submitted,

WILLIAM H. WATKINS,
Jackson, Mississippi;
JAMES McCLURE,
Sardis, Mississippi;
JOHN W. KYLE,
Sardis, Mississippi;
P. H. EAGER, JR.,
Jackson, Mississippi;
THOMAS H. WATKINS,
Jackson, Mississippi,
Counsel for Petitioner.

APPENDIX 1

Opinion of the Court

It seems to me, gentlemen, to determine the question as to whether the plaintiff in this case was doing business in the State of Mississippi, it is only necessary to consider the immediate transaction before the Court.

It is admitted by the stipulations in this case that the contract of employment in this case was entered into in Mississippi; that the landholder whose land is alleged to have been contracted to be sold is a citizen of the state of Mississippi; that the entire transaction took place in Mississippi with a resident of Mississippi. That in itself seems to me beyond question to constitute doing business in Mississippi. But if we must proceed further than that, the stipulations would show that thousands of dollars worth of business had been done for years, that over a period of years numerous sales and transactions had taken place; that in an organization which sold land in Arkansas, Tennessee, Mississippi, Missouri and Kentucky, that some eight to ten percent of their business arose from transactions in Mississippi. Their agents came into Mississippi, they made contracts in Mississippi; they showed land in Mississippi; they made contracts for sales and consummated sales here. That, in my judgment, is clearly doing business under the Mississippi law.

The case against the Memphis Publishing Company I do not think is in point at all with this case. In that case the Court was struggling with what proportion of an integrated business was done in Mississippi or without Mississippi. The Memphis Publishing Corporation is the publisher of a great newspaper. Their plant is without question located in the city of Memphis, where the newspaper is published. What the Court was trying to arrive at was whether they were doing business in this State by sending papers into it and having agents working there under it, not comparable to this at all, because this is merely a situation involving the sale of land and the entire transaction could be completed in Mississippi.

The sole question which remains to be determined in this case is whether or not under the Mississippi statute these contracts are void. There is no question that the Mississippi Legislature has a right to say that they might not use the Courts of the State of Mississippi to enforce them. They could not say that the Federal Courts would not take jurisdiction, but the mere effect of the statute is to say that Mississippi Courts may not assume jurisdiction. They have approached that problem, as I see it, in two ways. They have on certain occasions, as in the Marx & Bensdorf case and others, invoked one part of the statute and simply said you cannot use the Mississippi Courts to enforce this, and dismissed it on that ground. But in the Haygood case the Court approached the problem from a different angle, and in that case rather than to say that the Mississippi State Courts particularly cannot enforce these contracts, they went into what seems to me to be decision and not dicta, to the extent that they said these statutes made these contracts utterly void in this State and contrary to the public policy of the State. I could not personally agree that that is what the statute meant, but I am bound by the decision of the Supreme Court of Mississippi as to what the Mississippi statutes mean, and the Federal Courts are bound by them. I think that was not dicta. The Court had a right to decide it on that point if they wanted to. I have not seen any decision of the Mississippi Supreme Court which has criticized the Haygood case, or in any way reversed the Haygood case. I think it is the law in Mississippi under the Haygood case that these contracts are void. Being void, there would be no right in this Court or any other Court to enforce them.

The motion to dismiss, or for a summary judgment, would be sustained.

APPENDIX 2

Opinion of the Court

No. 12,259

INTERSTATE REALTY COMPANY

vs.

WOOD

Before Sibley and Lee, Circuit Judges, and Christenberry, District Judge

LEE, *Circuit Judge:*

This suit was filed by the appellant, a Tennessee corportation, to recover from appellee, a resident of Mississippi, a broker's commission alleged to be due on the sale of certain of appellee's real estate in the State of Mississippi. Appellee in his answer denied the right of appellant to recover, setting up that appellant was a foreign corporation which, because it had never qualified to do business in the State of Mississippi as provided by Mississippi law, was not entitled to maintain any suit in any court in Mississippi. After filing his answer, the appellee called upon appellant to admit, pursuant to Federal Rules of Civil Progedure, Rule 36, 28 U. S. C. A. following section 723c, that it had not qualified to do business in Mississippi. In response, appellant denied that it was doing business in Mississippi, but admitted a number of transactions in that State over a specific period of years. Upon this admission, the court below, on motion for summary judgment, found that appellant was doing business in Mississippi and held that the contract in question was void. Judgment was thereupon entered dismissing the plaintiff's suit with prejudice. This appeal followed.

The two questions involved are (1) Was appellant doing business in Mississippi within the purview of the statutes? and (2) if so, was the contract with appellee which was entered into in Mississippi null and void because appellant at that time had not qualified to do business in Mississippi?

(1) The record shows that appellant is a corporation organized under the laws of the State of Tennessee, with its domicile in Memphis, Tenn., and that it had never qualified to do business in Mississippi. Through its agents, however, it had contracted to sell real estate in Mississippi and in connection with sales had sent its agents into Mississippi to meet prospective buyers and to show the properties to be sold. Appellant admitted that in 1942 it earned from 3 sales in Mississippi $2,121.45; in 1943, from 2 sales, $4,064.25; in 1944, from 3 sales $12,000; in 1945, from 14 sales, $14,272.27; and in 1946 from 16 sales, $14,430.75. We think that in view of these admissions the court below was correct in holding that appellant was doing business in Mississippi within the meaning of the Mississippi statutes. Marx & Bensdorf, Inc. *v.* First Joint Stock Land Bank of New Orleans, 178 Miss. 345, 173 So. 297; Wiley Electric Co. *v.* Electric Storage Battery Co., 167 Miss. 842, 147 So. 773.

The question remaining is whether or not appellant's failure to qualify to do business in Mississippi struck with nullity the contract sued upon in this case. The pertinent sections of the Mississippi law are set forth in the margin.

The court below rested its decision upon Quartette Music Co. *v.* Haygood, 108 Miss. 755, 67 So. 211, 212, and held that under that case the contract here sued upon was null and void because at the time of contracting the appellant had not qualified to do business in the State of Mississippi. In so holding we think the court erred.

In the Haygood case the plaintiff was a Texas corporation and brought suit in the Circuit Court of Lee County, Mississippi, against J. L. Haygood and G. W. Long on a promissory note signed by them in the sum of $225. The defendant moved to dismiss, setting forth that the plaintiff was a foreign corporation and had not qualified to do business in Mississippi and that the note sued upon was the consideration for business done by the corporation in Mississippi. Plaintiff demurred to the plea on the ground that the law referred to was unconstitutional and that the plea did not state sufficient grounds for a dismissal. The trial court overruled the demurrer and dismissed the plaintiff's suit, and the

plaintiff appealed. The Supreme Court affirmed and, citing an earlier Mississippi case said:

"'Every contract made for, or about, any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the defaulter, because a penalty implies a prohibition, though there are no prohibitory words in the statute.'

"There are some decisions in our books which apparently conflict with this rule, but they were all overruled by Woodson *v.* Hopkins, 85 Miss. 171, 37 So. 1000, 38 So. 298, 70 L. R. A. 645, 107 Am. St. Rep. 275."

The latest case called to our attention from the Mississippi Supreme Court on the subject is Newell Contracting Co. *v.* State Highway Commission, 195 Miss. 395, 15 So. 2d 700, 702. There the court said:

"We are of the opinion that the court below was correct in holding that the appellant was doing business in this State and that there had been no substantial compliance with the statutes here involved until September 16, 1933, and that hence the contract sued on is void and unenforcible. Quartette Music Co. *v.* Haygood, 108 Miss. 755, 67 So. 211; Peterman Construction & Supply Co. *v.* Blumenfeld, 156 Miss. 55, 125 So. 548; Wiley Electric Co. *v.* Electric Storage Battery Co., 167 Miss. 842, 147 So. 773; Marx & Bensdorf, Inc. *v.* First Joint Stock Land Bank of New Orleans, 178 Miss. 345, 173 So. 297; Case *v.* Mills Novelty Co., 187 Miss. 673, 193 So. 625, 126 A. L. R. 1102" (Emphasis ours).

Whether the court in using the word "void" meant absolutely null, or void in the sense of unenforceable, the opinion does not make clear. Citation of the *Haygood* case would indicate that the court was of the opinion that the contract was absolutely null; but citation of the other cases, all of them opinions by the Supreme Court of Mississippi later in date than the *Haygood* case, would indicate that the court meant that the contract was "void" only in the sense that it was unenforceable in the Mississippi courts.

In Peterman Construction & Supply Co. *v.* Blumenfeld, supra, the Supreme Court of Mississippi said (156 Miss. 55, 125 So. 550):

". . . we think the case is controlled by Quartette Music Co. *v.* Haygood, supra, in which it is said that a contract made without first complying with the provisions of the above quoted statute could not be enforced in the courts of this State.

"That is the policy of this State, and while this case appears to be hard, in that finally the foreign corporation did comply with the law, yet in so far as it affects this contract the compliance cannot be made to relate back to the date of its execution. It was either enforceable on the date of its execution, or unenforceable. Under the statute, as construed by this court, the contract was not enforceable on its execution, and when the one contract was signed it was, in effect, a volume of business already transacted amounting to 200 separate and distinct contracts, in so far as the relation created between the foreign corporation and the several subscribers is concerned. . . ."

In Wiley Electric Co. *v.* Electric Storage Battery Co., supra, the Supreme Court of Mississippi said (167 Miss. 842, 147 So. 777):

". . . This statute closes the doors of the courts of this state to foreign corporations doing business in this State in violation of its provisions, consequently upon the proof in this record we think the suit should have been dismissed."

In Marx & Bensdorf, Inc. *v.* First Joint Stock Land Bank, supra, the Supreme Court of Mississippi in referring to the statute used the following language (178 Miss. 345, 173 So. 208):

". . . It will be noted that the last clause of that paragraph provides that any foreign corporation failing to comply therewith is barred from bringing and maintaining any suit in the courts of this state."

In Case *v.* Mills Novelty Co., supra, the Supreme Court of Mississippi said (187 Miss. 673, 193 So. 626):

"The servicing of this ice cream dispenser was purely a local transaction, not incidental to or necessary for the formation of the sales contract, and was subject wholly to the supervision and control of the State. It necessarily follows therefore that when servicing this ice cream dispenser, which it did through an agent employed for that purpose, the appellee was doing business in this State, and the contract of which this service agreement is a part violated Section 4164, Code of 1930, and is unenforceable."

(2). We think the cases cited in the *Newell Contracting Co.* case, with the exception of the *Haygood* case, all indicate that under the Mississippi statutes the prohibition merely closes the door of the State courts to a foreign corporation which has failed to qualify to do business in that State. That this is the true interpretation of the Mississippi law is made clear in Long Beach Canning Co. *v.* Clark, 1926, 141 Miss. 177, 106, So. 646, and Citizens' Bank of Hattiesburg *v.* Grigsby, 1934, 170 Miss. 655, 155 So. 684. In Long Beach Canning Co. *v.* Clark, supra, the Supreme Court of Mississippi said (141 Miss. 177, 106 So. 648):

". . . . In Quartette Music Co. *v.* Haygood, 108 Miss. 755, 67 So. 211, it was held that a foreign corporation doing business in this State, which had not filed its charter as required by this section, could not enforce its obligations in the courts of this State.

". . . . . .

"The statute does not make a forfeiture of property to the state for the failure to record its charter. It simply refuses the aid of its courts to those doing business in violation of the law without recording their charter."

In Citizens' Bank of Hattiesburg *v.* Grigsby, supra, the Mississippi Supreme Court said (170 Miss. 655, 155 So. 685):

"It is next contended that the contract was void, and that no validity can be given to the deed under the foreclosure. It will be noted, in considering this contention,

that the Franklin Bond & Mortgage Company is not a party to the suit, is seeking no relief in court, and has sought none. The statute bearing on the matter denies, to a corporation violating the statute, access to the courts for any relief. We do not think the statute avoids the contract so as to affect third persons, and we are of the opinion that nobody can raise this question but the state of Mississippi, when suit is brought by third persons, or when the litigation is between other persons than the corporation violating the statute and the state of Mississippi. In other words, a sale under a deed of trust in pais passes the title from the trustee to the purchaser. In the original contract between the Franklin Bond & Mortgage Company and Williams the title passed from Williams to the trustee. The language of the statute does not make the contract entirely void. See Middleton *v.* Georgetown Mercantile Co., 117 Miss. 134, 77 So. 956; Long Beach Canning Co. *v.* Clark, 141 Miss. 177, 106 So. 646; Nicholson *v.* Myres, 170 Miss. 441, 154 So. 282; Quitman County *v.* Stritze, 70 Miss. 320, 13 So. 36; and the authorities cited under these cases. See also, Springfield Grocery Co. *v.* Devitt, 126 Miss. 169, 88 So. 479.

"In our opinion, the case of Long Beach Canning Co. *v.* Clark, supra, is applicable here. In that case it was held, where a foreign corporation did business in this state without filing its charter as required by Section 945, Code 1906 (which is brought forward in the Code of 1930, section 4164), that this did not prevent it from selling property to liquidate its affairs on discontinuing its business, and that the statute prohibiting a foreign corporation from transacting business unless its charter was filed was intended only to deny such foreign corporation access to the courts of the state to enforce rights growing out of business transacted contrary to the statute. It would be too sweeping a decision to hold that the contract was utterly void as to third persons, and it would impose an unreasonable burden on other parties to compel them to see to it that a corporation had complied with the law of the state, when they desired to buy the property of such corporations."

When, therefore, the court in the Newell case used the words "void and unenforcible," we must interpret "void"

as meaning that no relief could be granted to a noncomplying foreign corporation in view of the statute. Supposing a Mississippi resident had sued a nonresident corporation in the Mississippi court for breach of contract, the contract having been entered into in Mississippi, would it be contended that the nonresident corporation could set up that since it had not qualified to do business in the State of Mississippi the contract entered into was void? We think not. The Mississippi statutes deny to the noncomplying corporation permission to bring a suit in the State courts; but they do not prevent such a corporation from being sued upon its contracts in the State courts.

(3, 4) But the prohibition in the State law closing the doors of the State courts extends no further than the State courts. The State of Mississippi is without authority to limit or extend the jurisdiction of the federal courts. If diversity of citizenship exists, the fact that a foreign corporation may not sue in the State courts because it has not complied with the conditions of doing business within the State does not shut the doors of the federal court sitting in that State. See David Lupton's Sons Co. *v.* Automobile Club of America, 225 U. S. 489, 32 St. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699; McLean *v.* York Oil Field Supply Co., Inc., 5 Cir., 138 F. 2d 802; Butler Bros. Shoe Co. *v.* U. S. Rubber Co., 8 Cir., 156 F. 1; Groton Bridge & Mfg. Co. *v.* Amer. Bridge Co., C. C. N. Y., 151 F. 871, 876, 877.

We therefore hold that the appellant has the right to sue on its contract in the Federal District Court sitting in Mississippi.

The judgment appealed from is reversed.

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12259

INTERSTATE REALTY COMPANY, *Appellant*,

vs.

J. S. WOODS, *Appellee*

Appeal for the District Court of the United States for the Northern District of Mississippi

(October 22, 1948)

On Petition for Rehearing

Before Sibley and Lee, Circuit Judges, and Christenberry, District Judge

Per CURIAM:

A rehearing is granted restricted to the question whether, in a diversity case, the doors of the federal court sitting in Mississippi are shut to a foreign corporation which may not sue in the state court because it has not complied with the condition for doing business within the state, the rehearing to be submitted upon briefs previously filed and to be filed on or before November 15, 1948.

APPENDIX 4

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12259

INTERSTATE REALTY COMPANY, *Appellant*,

vs.

J. S. WOODS, *Appellee*

Appeal from the District Court of the United States for the Northern District of Mississippi

(November 26, 1948)

On Rehearing

Before Sibley and Lee, Circuit Judges, and Christenberry, District Judge

PER CURIAM:

In our original opinion we held that the contract sued upon was not absolutely void but merely unenforceable in the State Court and that by reason of diversity of citizenship the suit may be maintained in the federal court. On application for rehearing, the appellee cited the case of *Angel* v. *Bullington*, 330 U. S. 183, as overruling the case of *David Lupton's Sons Co.* v. *Automobile Club of America*, 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177, upon which reliance was placed by us to sustain jurisdiction in the federal court. Accordingly, we granted a rehearing, restricted in its application to the question whether a foreign corporation might sue in the federal court when the doors of the State courts were closed to it because it had not complied with the conditions for doing business within the State.

The Supreme Court in the *Bullington* case was concerned with the application of the doctrine of res adjudicata under a North Carolina Statute prohibiting a suit for recovery on a deficiency judgment. What was said in that case about cases like *David Lupton's Sons Co.* v.

Automobile Club, was argumentatory. We do not consider it to have overruled the *David Lupton's Sons Co.* case upon the question with which we are now concerned and with respect to which the *David Lupton's Sons Co.* case expressly dealt.

Entertaining as we do this view, our original opinion and decree reversing the judgment appealed from are affirmed in their entirety and made the judgment of the court on rehearing.

APPENDIX 5

Section 5319, Mississippi Code of 1942

Resident Agent: How Designated.—Every domestic corporation shall maintain an office in the county of its domicile in this state, either in charge of an officer or officers of the corporation, or in charge of some persons or corporation duly designated as resident agent for service of process by the directors (by whatever name called) of such corporation, a duly certified copy of the resolution designating such resident agent, and the written acceptance of such agency by the agent, to be filed with the secretary of state. In the event of the death, resignation or removal of such resident agent, another shall be substituted within thirty days in the same manner and accompanied by the same fee as in the former appointment; and until such substitution, or in event of the failure of a corporation to so designate and qualify a resident agent where one is required by this act, the secretary of state shall be the agent for the service of process upon such corporation without resident agent, until one shall have been designated as herein provided.

Every foreign corporation doing business in the state of Mississippi, whether it has been domesticated or simply authorized to do business within the state of Mississippi shall file a written power of attorney designating the secretary of state or in lieu thereof an agent as above provided in this section, upon whom service of process may be had in the event of any suit against said corporation;

and any foreign corporation doing business in the state of Mississippi shall file such written power of attorney before it shall be domesticated or authorized to do business in this state, and the secretary of state shall be allowed such fees therefor as is (sic) herein provided for designating resident agents. Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state.

APPENDIX 6

Section 5339, Mississippi Code of 1942

Foreign Corporations May Be Domesticated.—Every company or corporation incorporated under the laws of any other state, territory or country, now doing business in this state, or hereafter desiring to do business in this state, and desiring to become a domestic corporation in this state, may file with the governor of the state a copy of its charter, or articles of incorporation or association, or in case such company or corporation is incorporated merely be a certificate, then a copy of its certificate of incorporation, duly authenticated and certified under the great seal of the state in which it was incorporated by charter or certificate.

APPENDIX 7

Section 5343, Mississippi Code of 1942

Charters To Be Filed.—Every company or corporation for profit incorporated under or by virtue of the laws of any government, or of any other state or territory, now or hereafter doing business in this state, shall file in the office of the secretary a copy of its charter or articles of incorporation, or in case such company or corporation is incorporated merely by certificate, then a copy of such certificate duly certified and authenticated. Said charters, articles of incorporation or certificates to be filed shall be

duly certified by the president and secretary, or other chief executive of such corporation, and by attaching thereto the corporate seal, and the secretary of state, on the payment of the fees herein provided for shall give certificate that said corporation has filed its charter or articles of incorporation as required by this act, and any foreign corporation which shall not file a copy of its charter or certificate or articles of incorporation, as provided in this act, shall be liable to a fine of not less than $100.00. This section shall not apply to insurance companies, and is not to be taken or construed to change or modify the laws which are directly applicable to the character of corporations.

APPENDIX 8

Section 5344, Mississippi Code of 1942

Foreign Corporations, Powers.—Corporations which exist by the laws of any other state of the Union, by the acts of Congress, or the laws of any foreign country, may sue in this state by their corporate names, and they shall also be liable to be sued or proceeded against, by attachment or otherwise, as individual non-resident debtors may be sued or proceeded against: And the acts of the agents of any such foreign corporation shall have the same force and validity as the acts of agents of private persons; but such foreign corporations shall not do or commit any act in this state contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy.

APPENDIX 9

Section 903, Mississippi Code of 1906.

Limitation on Corporate Holdings—Every corporation of the classes to be or heretofore created under the provisions of this chapter or the laws of this state may hold personal property in any amount necessary and proper

for its uses and purposes, and every such corporation, except manufacturing corporations, may hold lands necessary for its purposes to an amount in value not exceeding one million dollars; manufacturing corporations may hold land to an amount not exceeding two million dollars in value, but building, machinery and other fixtures on such land shall be excluded in valuing land. And a corporation shall not have a trust, use or benefit in property held in the name of any person or corporation for its use either expressly or secretly, to a greater amount than it may lawfully hold, nor shall any corporation employ its capital, money or other thing in any way other than in pursuit of its legitimate business; and a corporation offending against any of these provisions shall forfeit its charter and shall also forfeit to the state all real estate held above that which it may lawfully hold, but an increase in the market value of real estate after it has been acquired by a corporation over the limit it was or is authorized to hold shall not operate to forfeit either the charter or any part of the real estate of such corporation. Nothing herein contained shall prevent a corporation from taking land or a lien on land to a greater amount than it may lawfully hold in payment of or as a security for a debt, if the same shall not be held for a longer period than ten years.

REPLY

BRIEF

FOR

PETITION-

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 465

J. S. WOODS,

Petitioner,

vs.

INTERSTATE REALTY COMPANY,

Respondent

REPLY BRIEF FOR PETITIONER

I

Statement of Facts

The respondent purports to set out the cause of action which it asserts against petitioner. It must, of course, be understood that the statement is taken from respondent's complaint. It is very true that the cause of action as stated in respondent's complaint is as set out in respondent's brief. Turning to Transcript pages 56, 57 and 58 of the Record, it will appear that if the facts were true as alleged in petitioner's answer, the respondent had no right of recovery against petitioner though it abundantly appeared from the record, and is conceded in this case, that whatever the facts may have been in respect to the transactions be-

tween the respondent and petitioner, the respondent was transacting business in the State of Mississippi in violation of its laws and statutes.

II

This case involves a construction of three Mississippi statutes which relate not to the jurisdiction of the court but to the substantive law of the State.

Respondent's counsel are in error in stating that there are only two statutes involved in this case, to-wit: Section 5319 and Section 5344, Mississippi 1942 Code. As a matter of fact, as will appear from petitioner's brief, pages 47, 48 and 49, there are three statutes involved: Section 5319, which required the respondent to appoint an agent for service of process and, upon failure to do so, the statute provided that such foreign corporation should not be permitted to bring or maintain any action or suit in any of the courts of the state; Section 5343, which required a foreign corporation, before transacting any business in the state, to file a certified copy of its charter or articles of incorporation and, upon failure so to do, it was guilty of a misdemeanor and subject to a fine of not less than $100.00; Section 5344, which provided that such foreign corporation shall not do or permit any act contrary to the laws or policy thereof in which event it should not be allowed to recover on any contract made in the state in violation of law or public policy.

The respondent violated Section 5319 by failing to appoint an agent for service of process, violated Section 5343 by failing to file with the Secretary of State a certified copy of its charter or articles of incorporation and was therefore guilty of a misdemeanor and, as a consequence of its violation of Section 5319 and Section 5343, transacted business in Mississippi contrary to the laws and policy thereof and

therefore has no right of action against the petitioner by reason of the contract alleged to have been entered into between petitioner and the respondent in the State of Mississippi. Respondent's counsel say that Section 5319 and Section 5344 do not expressly make contracts entered into in violation thereof void and that, therefore, the respondent's alleged contract entered into with petitioner in the State of Mississippi is not void but is therefore enforceable.

Counsel concede that under the case of *Quartette Music Company* v. *Haygood*, 108 Miss. 755, 67 So. 211, the contract was absolutely null and void. In our original brief at pages 7 and 8, we pointed out that the Supreme Court of Mississippi had held that any contract for or about any matter prohibited and made unlawful was a void contract though the statute itself did not expressly so provide. The court in that opinion overruled previous opinions to the contrary. But counsel say that this rule was changed by the legislature by the passage of Section 5319 above referred to. The case of *Quartette Music Company* v. *Haygood, supra,* had under construction Section 935, Mississippi Code of 1906, in substantially the same language as Section 5343, Mississippi Code of 1942. The enactment of Section 5319 which appeared for the first time as Chapter 90 of the Laws of 1928 in no manner changed the rule announced in the *Quartette Music Company* case. As a matter of fact, the enactment of Chapter 90, Mississippi Laws of 1928, which was substantially the equivalent of Section 5319, added an additional qualification necessary and required of a foreign corporation before it might transact business in the State of Mississippi. The passage of Chapter 90, Mississippi Laws of 1928, brought forward as Section 5319, in no manner altered or modified Section 5343, Mississippi 1942 Code, but left the same in full force and effect. Prior to the pas-

sage of Chapter 90, Mississippi Laws of 1928, brought forward in Section 5319, there was no statute requiring a foreign corporation to appoint an agent for service of process. Upon the other hand, the insurance commissioner was provided as agent for service of process as to insurance companies and there was no statute providing for appointment of agent for service of process as to foreign corporations. The statutes required that jurisdiction might be obtained over foreign corporations by service upon any agent within the state.

Sections 5343 and 5344 appeared first in the Mississippi Code of 1906. Section 5319 appeared first in the Laws of 1928. Each of these sections were brought forward in the Code of 1930 and again in the Code of 1942. It is uniformly held that where a statute is re-enacted, the decisions of the court construing the same are made part of the re-enacted statute. *Hoy* v. *Hoy,* 48 So. 903, 93 Miss. 732; *White* v. *Railroad Company,* 97 Miss. 91, 55 So. 593; *Hammer* v. *Lumber Company,* 100 Miss. 349, 56 So. 466; *Mississippi Power & Light* v. *Garner,* 176 So. 280, 179 Miss. 588.

It is very true as pointed out by counsel in their brief in subsequent cases the Supreme Court of Mississippi has referred to the statute as rendering a contract unenforceable.

Counsel cite the case of *Long Beach Canning Company* v. *Clark,* 141, Miss. 177, 106 So. 646. In that case the court held that the mere fact that a foreign corporation has not qualified under the laws of the State of Mississippi did not prevent it from disposing of a single piece of property which it had acquired previously. The court held that the mere sale of a specific piece of property was not transacting business within the state.

The case of *Citizens Bank of Hattiesburg* v. *Grigsby,* 155 So. 684, 170 Miss. 655, merely held that a contract of a

reign corporation failing to comply with the state statutes d not void a conveyance of the property to a third person. he syllabi contains the following language at page 656:

"Contract for purchase of property sold on foreclosure under deed of trust which had been executed to foreign corporation not having filed its charter within state held not void as to third persons purchasing property (Code 1930, section 4164)."

However, in the most recent case upon the subject, *Newell onstruction Company* v. *State Highway Commission*, 15 o. (2d) 700, 195 Miss. 395, addressing itself to the effect n the enforceability of a contract entered into in the State f Mississippi by a foreign corporation without qualifying, ie court used the following language:

". . . we are of the opinion that the defendant, State Highway Commission, had the right to assume, without making any investigation in that behalf, that the complainant, as such a foreign corporation, had complied with the plain mandates of the law in these particulars, and that therefore the trial court was not in error in permitting the amendment so as to allow the defense to be made so as to show that the contract sued on was wholly void and unenforceable, and this is especially true in the absence of a showing that the defendant had notice of the non-compliance with the statutes prior to the taking of the evidence by the complainant in support of the allegations of its bill of complaint . . ."

In the foregoing case, the Supreme Court of Mississippi ot only said that the contract was wholly null and void s to the foreign corporation but contained a very clear ntimation that a like result would follow as to the defendnt if it had knowledge of such failure; that is to say, in uch event the contract would be void as to both of the arties.

The Supreme Court of Mississippi has definitely settled in very recent cases that a contract made in violation of a statute is void and unenforceable although the statute does not so provide in express terms. In the case of *Grapico Bottle Company* v. *Ennis*, 140 Miss. 502, 106 So. 97, the court held that contracts made in violation of the Sunday laws were void and that neither party could recover thereupon when they were *in pari delicto*.

In the case of *Miller* v. *Lynch*, 38 Miss. 344, it was held that a promissory note executed on Sunday was void.

In the case of *Jones* v. *Brantley*, 121 Miss. 721, 83 So. 802, it was held that an attorney could not recover for legal services rendered upon the Sabbath day.

In the case of *Aldrich* v. *Rice*, 161 Miss. 879, 138 So. 570, the Mississippi Code prohibited the taking of a promissory note in payment of a subscription to capital stock of the corporation. The court held that since the taking of the note was expressly forbidden by statute, the consideration was illegal and conferred no right upon the holder of the note.

In the case of *Mitchell* v. *Campbell*, 111 Miss. 806, 72 So. 31, it was held that where a landlord leases his property for immoral purposes that a note given therefor was not enforceable but was void even in the hands of an innocent purchaser for value.

The following decisions from this Court are directly in point:

It is unlawful to contract to do that which it is unlawful to do. *Bank of U. S.* v. *Owens*, 27 U. S. 527, 7 L. Ed. 508.

A contract to do an act forbidden by law cannot be enforced in a court of justice. *Tiffany* v. *Boatman's Sav. Inst.*, 85 U. S. 375, 21 L. Ed. 868.

An action cannot be maintained on a contract, the making of which is prohibited by statute. *Armstrong* v *Toler*, 24 U. S. 258, 6 L. Ed. 468.

In the case of *Walworth* v. *Kneeland*, 56 U. S. 348, 14 L. Ed. 724, it is held that a contract forbidden by an act of Congress is void and may not be enforced.

In the case of *Bank of U. S.* v. *Owens*, 27 U. S. 527, 7 L. Ed. 508, it is held that where a statute imposes a penalty for an act, a contract based thereon is illegal, though the statute does not expressly so declare.

A contract forbidden by law may not be enforced. *United States of America* v. *City and County of San Francisco*, 310 U. S. 16, 84 L. Ed. 1050.

Again, however, we place emphasis on the view which we have presented to the Court in our original brief that the question doesn't turn on whether the contract is totally void or merely unenforceable. Under the Judiciary Act of 1789, brought forward in Section 725, Title 28, U. S. C. A., the statutes of the state are made binding upon the federal court. Therefore, the determinative question is as to whether or not recovery could be had by the respondent upon the contract sued upon in the state court. If the contract sued upon was made in violation of law, was prohibited by the statutes of the State of Mississippi under the circumstances made, recovery would be denied to the respondent not only in the state court but in the federal court.

Respondent's counsel cite the case of *Bradford* v. *Indiana Harbor Belt Railroad Company* (C. C. A. 7), 16 Fed. (2d) 836; *Industrial Finance Corporation* v. *Community Finance Company*, (C. C. A. 5), 294 Fed. 870; *Brace* v. *Gauger-Kor[illegible]o Construction Company* (1929, C. C. A. 8), 36 F. (2d) 661. These cases merely announce the rule stated in the *Lupton* case and if the rule therein announced be

obsolete under the case of *Angel* v. *Bullington*, the decisions likewise are no longer authorities.

III

Respondent's suit is not for the recovery of a penalty but on alleged breach of contract of which the United States District Court had jurisdiction. The plaintiff, however, had no cause of action.

Respondent's counsel present the view that the Court will not enforce a penalty and seek to draw the rule therefrom that a defendant may not plead in bar of an action the illegality of the contract sued upon as being prohibited by statute. There is a rule prevailing in the federal courts as well as state courts that neither the federal court nor the state court will enforce at the instance of the plaintiff a penal action. The rule is very well illustrated insofar as the state court is concerned by the cases of *Brown* v. *Kildare* (Washington), 108 Pac. 452; *People* v. *Crucible Steel Company*, 151 Mich. 718, 115 N. W. 705.

A typical case in the federal court is *Wisconsin* v. *Pelican Insurance Company*, 127 U. S. 265, 32 L. Ed. 239. In that case the State of Wisconsin recovered a judgment against the Pelican Insurance Company of Louisiana in a state court for pecuniary penalties for failure to discharge certain obligations to the State of Wisconsin. Being unable to realize on the judgment, the State of Wisconsin filed an original action before this Court seeking to enforce its judgment. The Court declined to do so holding that the action was one for the recovery of penalties. The Court held that the judgment rendered in the State of Wisconsin was not entitled to receive full faith and credit under the Constitution of the United States. This case, however, has been subjected to criticism and modification.

The case of *Milwaukee County* v. *M. E. White Company*, 296 U. S. 268, 80 L. Ed. 220, was a suit brought not originally

in this Court but in the United States District Court of the State of Illinois to recover on a judgment rendered by a Wisconsin court for taxes due the State of Wisconsin. Mr. Justice Stone, in delivering the opinion of the court in holding that the case was not for the recovery of a penalty and therefore not one which the Court could not take jurisdiction of, used the following language:

> "By Sec. 24 of the Judicial Code, U. S. C. A., title 28, Sec. 41, district courts are given original jurisdiction 'of all suits of a civil nature at common law or in equity', where there is the requisite diversity of citizenship and the amount of controversy exceeds $3,000. In this grant of jurisdiction of causes arising under state as well as federal law the phrase 'suits of a civil nature' is used in contradistinction to 'crimes and offenses,' as to which the jurisdiction of the district courts is restricted by Sec. 24 (2) to offenses against the United States. Thus suits of a civil nature within the meaning of the section are those which do not involve criminal prosecution or punishment, and which are of a character traditionally cognizable by courts of common law or of equity."

Mr. Justice Stone in the opinion in that case called attention to the distinction which must be observed in this case; that is to say, the difference between a want of jurisdiction in the court where the suit is filed and the lack of merits in the plaintiff's case. Addressing himself to that question, Mr. Justice Stone used the following language:

> "The objection that the courts in one state will not entertain a suit to recover taxes due to another or upon a judgment for such taxes is not rightly addressed to any want of judicial power in courts which are authorized to entertain civil suits at law. It goes not to the jurisdiction but to the merits, and raises a question which district courts are competent to decide. See Illinois C. R. Co. v. Adams, 180 U. S. 28, 45 L. Ed.

410, 21 S. Ct. 251; General Invest. Co. v. New York C. R. Co. 271 U. S. 228, 230, 70 L. Ed. 920, 921, 46 S. Ct. 496; Becker Steel Co. v. Cummings, decided November 11, 1935 (296 U. S. 74, ante, 54, 56 S. Ct. 15)."

In the case of *General Investment Company* v. *New York Central Railroad Company*, 271 U. S. 228, 70 L. Ed. 920, this Court, speaking through Mr. Justice Van Devanter, used the following language:

> "There may be jurisdiction and yet an absence of merits (The Fair *v.* Kohler Die & Specialty Co., 228 U. S. 22, 25, 56 L. ed. 716, 717, 33 Sup. Ct. Rep. 410; Geneva Furniture Mfg. Co. *v.* S. Karpen & Bros., 238 U. S. 254, 258, 59 L. ed. 1295, 1297, 35 Sup. Ct. Rep. 788)."

A very interesting case is that of *Fauntleroy* v. *Lum*, 210 U. S. 230, 52 L. Ed. 1039. In that case the appellant entered into contracts in the State of Mississippi gambling in cotton futures. The contract was unenforceable in the State of Mississippi. However, the respondent was able to obtain service of process on the appellant in the State of Missouri and recovered judgment therein. The suit was brought upon the judgment in the State of Mississippi and the appellant, Fauntleroy, made the defense that the cause of action was void under the Mississippi law and that suit could not be maintained in the state court. Mr. Justice Holmes used the following language:

> "The main argument urged by the defendant to sustain the judgment below is addressed to the jurisdiction of the Mississippi courts.
>
> "The laws of Mississippi make dealing in futures a misdemeanor, and provide that contracts of that sort, made without intent to deliver the commodity or to pay the price, 'shall not be enforced by any court.' Annotated Code of 1892, Sec. 1120, 1121, 2117. The defendant contends that this language deprives the Mississippi courts of jurisdiction, and that the case is like

Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92. There the New York statutes refused to provide a court into which a foreign corporation could come, except upon causes of action arising within the state, etc.; and it was held that the state of New York was under no constitutional obligation to give jurisdiction to its supreme court against its will. One question is whether that decision is in point.

"No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to the power, the other only to the duty, of the court. Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless reversed. Yet a statute could be framed that would make the power, that is, the jurisdiction, of the court, dependent upon whether there was a consideration or not. Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense. When it affects a court of general jurisdiction, and deals with a matter upon which that court must pass, we naturally are slow to read ambiguous words as meaning to leave the judgment open to dispute, or as intended to do more than to fix the rule by which the court should decide.

"The case quoted concerned a statute plainly dealing with the authority and jurisdiction of the New York court. The statute now before us seems to us only to lay down a rule of decision. The Mississippi court in which this action was brought is a court of general jurisdiction and would have to decide upon the validity of the bar, if the suit upon the award or upon the original cause of action had been brought there. The words 'shall not be enforced by any court' are simply another, possibly less emphatic, way of saying that an action

> shall not be brought to enforce such contracts. As suggested by the counsel for the plaintiff in error, no one would say that the words of the Mississippi statute of frauds, 'An action shall not be brought whereby to charge a defendant,' Code 1892, Sec. 4225, go to the jurisdiction of the court. Of course it could be argued that logically they had that scope, but common sense would revolt."

The statement of Judge Holmes in the foregoing opinion in reference to the Mississippi statute of frauds is a most relevant illustration. Section 264, Mississippi 1942 Code, provides that no suit shall be brought to charge a defendant or other party (a) upon any promise to answer for the debt of another (b) upon any agreement made upon consideration of marriage, etc. A copy of the statute is made *Appendix 1* hereto.

As well pointed out by Judge Holmes, the statute does not affect the jurisdiction of the court. It relates to the liability of the party sought to be held responsible.

In the case of *Wabash R. Co.* v. *Duncan* (8th Cir.) 170 Fed. (2d) 38, the following language is used at Page 41:

> "'Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. . . . It may undoubtedly be shown in defense that plaintiff has no right under the allegations of his bill or the facts of the case to bring suit, but that is no defect of jurisdiction, but of title.' Illinois Central Railroad Co. *v.* Adams, 180 U. S. 28, 34, 21 S. Ct. 251, 253, 45 L. Ed. 410. See also Walling *v.* Miller, 8 Cir., 138 F. 2d 629, 631, and cases cited."

In the case of *Walling, Administrator*, v. *Miller*, 8th Circuit, 138 Fed. (2d) 629, addressing itself to the identical question as to the difference between jurisdiction and merits, the court used the following language:

> "On the distinction between a question of jurisdiction and a question of merits in such a case, the Court said:

'By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits (citations) as where the plaintiff seeks preventive relief against a threatened violation of law of which he has no right to complain, either because it will not injure him or because the right to invoke such relief is lodged exclusively in an agency charged with the duty of representing the public in the matter. Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction. (Citations.). If it be resolved against him, the appropriate decree is a dismissal for want of merits, not for want of jurisdiction.' (271 U. S. 230, 46 S. Ct. 497, 70 L. Ed. 920)

"In the Adams case the Court said that a person without a legal interest in a cause of action could not maintain a suit in his own name; 'but it never would be contended that the court would not have jurisdiction to inquire whether such disability in fact existed, nor that the case could be dismissed on motion for want of jurisdiction. The right to bring a suit is entirely distinguishable from the right to prosecute the particular bill.' (180 U. S. 28, 21 S. Ct. 253, 45 L. Ed. 410.) The decision in the Venner case is to the same effect."

The respondent in this case was not suing for a penalty. The suit is for breach of contract. The district court had no option other than to take jurisdiction of the case. The petitioner, among other defenses, pleaded that the contract was void and unenforceable under the laws of the State of Mississippi. This was not a plea to the jurisdiction of the court but was a plea in bar in defense of the action. Respondent's suit was dismissed not on any ground of jurisdiction but because the respondent had no cause of action under the laws and statutes of the State of Mississippi.

As we have stated; the respondent's cause of action is not one for a penalty but is brought to recover money alleged to be due and owing growing out of a contract. The Court had perfect jurisdiction. While it may be true that a plaintiff may not sue in the Federal Court to recover a penalty, a defendant sued may plead any available defense under the state law although the contract entered into was punishable as a crime. The fact that a plaintiff may not sue to recover a penalty in the Federal Court does not deprive a defendant of the right to avail himself of any defense available under state law.

In the case of *Uhlmann Grain Co.* v. *Dickson*, 288 U. S. 188, 77 L. Ed. 691, 83 A. L. R. 492, suit was brought in the State of Missouri in the District Court of the United States to recover by a broker for losses sustained under a contract for sale of commodities in futures. It entered into the contract in the State of Missouri, which was punishable as a crime and was void and unenforceable in any Court. The District Court of the United States took jurisdiction of the case and determined the same on the merits. The case presented no question of jurisdiction.

Since the granting of certiorari, the United States Court of Appeals, Seventh Circuit, has rendered a decision which we deem it our duty to direct to the attention of the Court, in the case of *Davidson et al.* v. *Gardner*, 172 Fed. (2d) 188. In that case suit was brought in the Federal Court of the United States for the Northern District of Illinois to recover for damages for a death occasioned by the negligence of railroad employees in the State of Missouri under the Federal Employers' Liability Act. In the State of Illinois there was in force the following statute:

> "Sec. 2, Chap. 70 of the Illinois Injuries Act provides: 'That no action shall be brought or prosecuted in this State to recover damages for a death occurring

outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.' "

The appellee defendant presented the view to the Court in defense of the action that no such suit could be maintained in the State Court and, therefore, the action would not lie in the Federal Court. The Court of Appeals correctly held that the statute in question dealt not with the question of liability but with the jurisdiction of the Court and that the Federal Court in Illinois could not be deprived of jurisdiction by an Illinois statute. The Court, in our judgment, reached the correct conclusion. The case of *Angel* v. *Bullington* was not applicable thereto. The statute of Illinois was intended to affect the jurisdiction of the Court and not the question of liability. Such liability as there was, if any, arose under an act of Congress and the United States District Court of Illinois had no choice except to take jurisdiction of and proceed with the case.

Mr. Justice Holmes, in the case of *Fauntleroy* v. *Lum*, 210 U. S. 230, 52 L. Ed. 1039, called attention to the difficulty sometimes in determining the question as to whether or not a state statute affected the jurisdiction of the Court or dealt with the merits of the controversy, referring to the case of *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373, 48 L. Ed. 225. There a New York statute prohibited the maintenance in a State Court of an action on a judgment by one foreign corporation against another foreign corporation. In view of the fact that the statute dealt with the jurisdiction only of Courts and not with the merits of the controversy the statute was held valid.

With this distinction in mind, turning to the Illinois statute, reviewed by the Court of Appeals, Seventh Circuit, on its face the statute was intended to deal, not with the merits

of the controversy, but with the jurisdiction of State Courts of Illinois. Therefore, the rule announced in *Angel* v. *Bullington* was not applicable. The Illinois statute did not deal with the merits; it dealt only with the jurisdiction of the State Courts in Illinois.

Coming to the Mississippi statutes under consideration, as Mr. Justice Holmes said in the case of *Fauntleroy* v. *Lum*, it would be repugnant to common sense to hold that the Mississippi statutes related to jurisdiction and had no reference to the merits of the controversy. It must be borne in mind in Mississippi there are three statutes. These statutes have been construed by the Supreme Court of Mississippi in some instances as rendering a contract entered into in violation of them as being totally void; in some instances as being void and unenforceable. The statutes, however, relate to the merits of the controversy. They affect the right of the plaintiff to recover and confer upon the defendant a complete defense thereto whether in the State or the Federal Court.

We respectfully submit that the judgment of the United States Court of Appeals, Fifth Circuit, should be reversed and the judgment of the District Court affirmed.

Respectfully submitted,

WILLIAM H. WATKINS,
Jackson, Mississippi;
JAMES MCCLURE,
Sardis, Mississippi;
JOHN W. KYLE,
Sardis, Mississippi;
P. H. EAGER, JR.,
Jackson, Mississippi;
THOMAS H. WATKINS,
Jackson, Mississippi,
Counsel for Petitioner.

APPENDIX 1

"264. Certain contracts to be in writing.—An action shall not be brought whereby to charge a defendant or other party:

(a) Upon any special promise to answer for the debt or default or miscarriage of another person;

(b) Upon any agreement made upon consideration of marriage, mutual promises to marry excepted;

(c) Upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year;

(d) Upon any agreement which is not to be performed within the space of fifteen months from the making thereof; or

(e) Upon any special promise by an executor or administrator to answer any debt or damage out of his own estate;

Unless, in each of said cases, the promise or agreement upon which such action may be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some person by him or her thereunto lawfully authorized in writing."